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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 78.

LEBBEUS H. ROGERS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 21, 1888.

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1 The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States of America, plaintiffs, and Lebbeus H. Rogers, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the third Monday of the October term of said Supreme Court, eighteen hundred and eighty-eight, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

2 Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the 16th day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.

WM. J. WALLACE, *Judge.*

3 [Endorsed:] E. & A. A. 717. The Supreme Court of the United States. Lebbeus H. Rogers, plaintiff in error, against The United States, defendant in error. Writ of error. Bliss & Schley, attorneys for plaintiff in error, 160 Broadway, New York. Please take notice that the within is a copy of —, this day duly entered and filed herein in the office of the clerk of —. Dated ——, 188-. Bliss & Schley, attorneys for —. To —— ——. Service of a copy of the within and notice above is hereby admitted. Stephen A. Walker, U. S. att'y. 1.45 ch. [Stamped:] U. S. circuit court. Filed Apr. 16, 1888. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to fifty-five, inclusive, contain a true and complete transcript

of the records and proceedings had in said court in the case of Lebbeus H. Rogers, plaintiff in error, against The United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of August, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the district court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States of America, plaintiff, ag'st Lebbius H. Rogers, defendant, a manifest error hath happened, to the great damage of the said Lebbius H. Rogers, defendant, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the circuit court of the United States for the southern district of New York, at the U. S. court building, in the city of New York, together with this writ, so that you have the same at the said place, before the justice aforesaid, on the third Monday of October next, that, the record and proceedings aforesaid being inpected, the said justices of the said circuit court may cause further to be done therein to correct that error what of right and according to the law and custom
5 of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the *circuit* Court of the United States, this 6th day of May, in
[SEAL.] the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
ADDISON BROWN.

I, Sam'l H. Lyman, clerk U. S. district court, southern district of

New York, do hereby certify that the return to the foregoing writ of error appears in the papers and proceedings hereto annexed.

Dated Oct. 18, 1887.

[SEAL.] SAM'L H. LYMAN, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York. Lebbeus H. Rogers, plaintiff in error, ag'st The United States, defendant in error. Writ of error. Bliss & Schley, att'ys for plaintiff in error, 160 Broadway, New York. Filed May 6th, 1887.

6 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States for the southern district of New York, to be holden at New York on the third Monday of October, eighteen hundred and eighty-seven, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the southern district of New York, wherein Lebbius H. Rogers is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated May 6th, 1887.

ADDISON BROWN.

(Endorsed:) U. S. circuit court. Lebbius H. Rogers, plaintiff in error, against The United States, defendant in error. Citation. Filed May 6, 1887.

7 [Endorsed:] Circuit court of the United States for the southern district of New York. Lebbeus H. Rogers, plaintiff in error, against The United States of America, defendant in error. Writ of error. Bliss & Schley, attorneys for plaintiff in error; Stephen A. Walker, U. S. attorney, attorney for defendant in error. U. S. circuit court. Filed Oct. 18, 1887. Timothy Griffith, clerk.

8 United States District Court for the Southern District of New York.

THE UNITED STATES OF AMERICA
against
LEBBEUS H. ROGERS.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the United States attorney for said district within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Addison Brown, judge of the district

court of the United States for the southern district of New
[SEAL.] York, at the city of New York, this 12th day of March, in the year one thousand eight hundred and eighty-five.

SAMUEL H. LYMAN, *Clerk.*

ELIHU ROOT,
United States Attorney.

Office and post-office address: U. S. court and post-office building, Broadway and Park row, New York.

9 U. S. District Court, Southern District of New York.

THE UNITED STATES
against
LEBBEUS H. ROGERS.

The above-named plaintiff, by Elihu Root, its attorney, complaining of the above-named defendant, alleges on information and belief—

I.

That on or about the 13th day of March, 1878, the above-named defendant, by a certain writing obligatory, sealed with his seal and now here shown to this court, a copy of which is hereto annexed and made part of this complaint, acknowledged himself to be held and firmly bound unto the plaintiff in the sum of $12,000, for the payment whereof the defendant bound himself, his heirs, executors, and administrators, in the whole and for the whole, severally firmly by said writing obligatory.

That the said writing obligatory was then and there and yet remains subject to a certain condition thereunder written, whereby it was and is provided that whereas Henry W. Howgate, who was then and there first lieutenant 20th infantry, United States Army, was duly assigned to duty as a property and disbursing officer, Signal Service, United States Army, and has accepted said assignment:

Therefore, if the said Henry W. Howgate shall and doth at all times henceforth—that is to say, after the making and deliv-
10 ery of said writing obligatory and during his holding and remaining in said office—carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of Signal Service, U. S. Army, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue.

That afterwards the said Henry W. Howgate entered upon the duties of property and disbursing officer, Signal Service of the United States Army.

The plaintiff, for assigning a breach of said writing obligatory, avers that while the said Henry W. Howgate, acting as property and disbursing officer as aforesaid, did not carefully discharge the duties of his office and faithfully expend all public moneys and

honestly account for the same and for all public property which came into his hands on account of the Signal Service, U. S. Army, without fraud or delay, in this, that he, the said Henry W. Howgate, on divers dates during the years 1878, 1879, and 1880, while acting as such property and disbursing officer as aforesaid, in that capacity did receive from the said plaintiff on account of the Signal Service of the United States Army a certain sum of money, to wit, the sum of $133,255.22, which said sum he, the said Howgate, did not faithfully expend and has not accounted for, although duly requested so to do.

Whereby the plaintiff has suffered damage to the amount of $133.255.22.

Wherefore the plaintiff demands judgment against the defendant for the sum of $12,000, the penalty of the bond referred to in this complaint, with interest, besides the costs of this action.

ELIHU ROOT,
U. S. Attorney.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

George E. P. Howard, being duly sworn, deposes and says
11 that he is an assistant United States attorney and has read the foregoing complaint; that the same is true of his own knowledge except as to those matters alleged on information and belief, and as to those matters he believes it to be true.

G. E. P. HOWARD.

Sworn to before me this 11th day of March, 1885.

BENJAMIN BARKER, JR.,
[L. S.] *Notary Public, N. Y. Co.*

Know all men by these presents that we, Henry W. Howgate, 1st Lt. 20th U. S. infantry; William B. Moses, Washington, D. C., and Lebbeus H. Rogers, New York city, New York, are held and firmly bound unto the United States of America in the sum of ($12,000) twelve thousand dollars, lawful money of the United States, to be paid to the said United States; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the — day of March, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of said States the one hundred and second.

The condition of this obligation is such that whereas the above-bounden First Lieut. Henry W. Howgate, 20th infantry, has been assigned to duty as a property and disbursing officer, Signal Service, U. S. A.; has accepted said assignment: Now, if the said 1st Lieut. Henry W. Howgate, 20th infantry, shall and doth at all times henceforth and during his holding and remaining in said office carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same and for all public

property which shall or may come into his hands on account
12 of Signal Service, U. S. Army, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue.

HENRY W. HOWGATE. [SEAL.]
LEBBEUS H. ROGERS. [SEAL.]
W. B. MOSES. [SEAL.]

Signed and delivered in presence of—
JAMES A. SWIFT,
ANSON MALTBY,
Witness- as to Lebbeus H. Rogers.
JAMES A. SWIFT,
Witness as to W. B. Moses.

U. S. District Court, Southern District of New York.

THE UNITED STATES
against
LEBBEUS H. ROGERS.

The defendant for answer to the complaint herein, by Bliss & Schley, his attorneys, shows to the court as follows:

First. He alleges that the bond in the complaint mentioned is of no force and effect, the same having been executed, taken, and delivered without authority of law and in violation of law.

Second. Upon information and belief he denies the allegation of the fourth and fifth folios of the complaint.

13 Third. For a further defense he says that heretofore the proper auditing officer of the United States did make and issue a statement and certificate that the said Henry W. Howgate has fully accounted for all money and property which came to his hands, and that upon the faith of such certificate this defendant paid over and parted with a large sum of money in his hands belonging to said Howgate which he would otherwise have held and retained to protect and save himself harmless of and from any liability for or on account of the bond in the complaint mentioned or the said Howgate.

BLISS & SCHLEY,
Attorneys for Defendant, 160 *Broadway.*

CITY AND COUNTY OF NEW YORK, *ss:*

Lebbeus H. Rogers, being duly sworn, says he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

LEBBEUS H. ROGERS.

Sworn to before me this 4th day of May, 1885.
JOHN S. DERBY,
Notary Public, N. Y. City and Co.

14 United States District Court, Southern District of New York.

THE UNITED STATES
against
LEBBEUS H. ROGERS.

It is hereby stipulated and agreed between the parties to this action that the right of trial by jury be waived and that the cause be tried by this court without a jury.

Dated New York, June 17th, 1886.

STEPHEN A. WALKER,
J. M. W.,
United States Attorney.
GEORGE BLISS,
Attorney for the Defendant.

United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
LEBBEUS H. ROGERS.

It is hereby stipulated by and in behalf of the defendant, Lebbeus H. Rogers, that upon the trial of this action the defendant will admit as a matter of fact that late First Lieutenant Henry W. Howgate, 20th infantry, while acting as property and dis-
15 bursing officer, Signal Service, U. S. Army, did not carefully discharge the duties thereof and faithfully expend all public moneys and honestly account for the same and for all public property which came into his hands, but did fraudulently and with intent to defraud the plaintiffs embezzle the sum of $133,255.22.

And it is further admitted that the said Henry W. Howgate, late first lieutenant 20th infantry and property and disbursing officer, Signal Service, U. S. Army, is indebted to the United States of America for moneys received as property and disbursing officer, Signal Service, U. S. Army, between the first day of April, 1878, and the 31st day of September, 1881, in the sum of $133,255.22.

BLISS & SCHLEY,
Defendant's Attorneys.

Dated New York, February 4th, 1886.

United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
LEBBEUS H. ROGERS.

The above-entitled action having heretofore and on June 7th, 1886, come on to be tried at a stated jury term and the cause having been reached in its order on the calendar, and a jury trial having been waived in open court and the same having been by consent

of both parties tried by the court without a jury, having
16 heard the testimony of the witnesses and the arguments of counsel thereon and due deliberation being had, I, the judge before whom such case was tried, make the following findings of fact and conclusions of law:

Findings of Fact.

1st. That long prior to 1874 the signal corps, under the Department of War, was organized, and has continued from its organization to the present time under such department; that during such time such signal corps has had property and disbursing officers.

2d. That prior to 25th July, 1876, one Henry W. Howgate was a first lieutenant of the 20th infantry of the United States Army, attached to the signal corps.

3d. That on the 25th July, 1876, said Howgate by a special order as follows:

"WAR DEPARTMENT,
"OFFICE OF THE CHIEF SIGNAL OFFICER,
"WASHINGTON, D. C., *July* 25, 1876.

"Special Orders, }
"No. 115. }

"2. First Lieutenant H. W. Howgate, 20th infantry, brevet captain U. S. A., acting signal officer and assistant, is hereby assigned to duty as property and disbursing officer at this office, together with such other duties as may be assigned to him.

"3. First Lieutenant Henry Jackson, 7th cavalry, acting signal officer and assistant, is hereby relieved from duty as property and disbursing officer at this office and will turn over all Government property and funds pertaining to this office for which he is responsible to First Lieutenant H. W. Howgate, 20th infantry, brevet captain U. S. A., acting signal officer and assistant, who will
17 receive and receipt for the same.

"By order of the chief signal officer of the army:
"GARRICK MALLERY,
"*Captain 1st Inf'y, Bat. Lieut. Col. U. S. A.,*
"*Acting Signal Officer and Assistant.*"

was assigned to duty as property and disbursing officer in the office of the chief signal officer, and he voluntarily accepted such assignment and entered upon the duties thereof.

4th. That in March, 1878, said Howgate, as principal, and the defendant, as one of the sureties, executed and delivered the bond mentioned in, and a copy of which is annexed to, the complaint in this action.

5th. That such bond is in the penal sum of $12,000 and is conditioned as follows: "That whereas the above-bounden First Lieut. Henry W. Howgate, 20th infantry, has been assigned to duty as a property and disbursing officer, Signal Service, U. S. A., — has accepted said assignment: Now, if the said First Lieut. Henry W. How-

gate, 20th infantry, shall and doth at all times henceforth and during his holding and remaining in said office carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of Signal Service, U. S. Army, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue."

6th. That said Henry W. Howgate, 20th infantry, while acting as property and disbursing officer, Signal Service, U. S. Army, did not carefully discharge the duties thereof and faithfully expend all public moneys and honestly account for the same and for all public property which came into his hands, but did fraudulently and with intent to defraud the plaintiffs embezzle the sum of $133,255.52.

18 7th. That the said Howgate is indebted to the United States of America for moneys received as property and disbursing officer, Signal Service, U. S. Army, between the first day of April, 1878, and 31st day of September, 1881, in the sum of $133,255.52.

8th. That such bond was made, executed, delivered, and given by said Howgate and the defendant and the other surety voluntarily.

9th. That there is now due on said bond the sum of $12,000, with interest from 31st March, 1885, making in all $13,476.

Conclusions of Law.

1st. That the office of property and disbursing officer, Signal Service, U. S. Army, is one created and duly authorized by law.

2d. That the duties assigned to such officer are duly authorized by law.

3d. That duties covered by the bond in this action are authorized by law.

4th. That the bond in the complaint mentioned is a legal, valid obligation.

5th. That the plaintiff is entitled to judgment against the defendant for the sum of $12,000, with interest from March 31, 1885, amounting in all to $13,476, for which sum judgment is ordered, with costs.

Dated April 18, 1887.

ADDISON BROWN.

19 District Court of the United States for the Southern District of New York.

THE UNITED STATES
against
LEBBEUS H. ROGERS.

Bill of Exceptions.

And afterwards, to wit, at the June term, 1886, this cause came on

to be tried before the Hon. Addison Brown, judge of said court, the right to a trial by jury having been waived by the respective parties and a consent given that the same be tried by the court without a jury, said waiver and consent having been duly filed with the clerk of the court. The parties appeared, by their respective counsel—G. E. P. Howard, assistant United States attorney, for the plaintiffs, and George Bliss, for the defendant.

The plaintiffs, to maintain the issues on their part, put in evidence an order of which the following is a copy:

WAR DEPARTMENT,
OFFICE OF THE CHIEF SIGNAL OFFICER,
WASHINGTON, D. C., *July* 25, 1876.

Special order No. 115.

(Extract.)

2. First Lieutenant H. W. Howgate, 20th infantry, brevet captain U. S. A., acting signal officer and assistant, is hereby assigned to duty as property and disbursing officer at this office, together with such other duties as may be assigned to him.

3. First Lieutenant Henry Jackson, 7th cavalry, acting signal officer and assistant, is hereby relieved from duty as property and disbursing officer at this office, and will turn over all Government property and funds pertaining to this office for which he is responsible to First Lieutenant H. W. Howgate, 20th infantry, brevet captain U. S. A., acting signal officer and assistant, who will receive and receipt for the same.

By order of the chief signal officer of the army:

GARRICK MALLERY,
Captain 1st Inf'y, Bvt. Lieut. Col. U. S. A.,
Acting Signal Officer and Assistant.

They also put in evidence a bond, of which the following is a copy:

Know all men by these presents that we, Henry W. Howgate, first Lt. 20th U. S. infantry; William B. Moses, Washington, D. C., and Lebbeus H. Rogers, New York city, New York, are held and firmly bound unto the United States of America in the sum of ($12,000) twelve thousand dollars, lawful money of the United States, to be paid to the said United States; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the — day of March, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of said States the one hundredth and second.

The condition of this obligation is such that whereas the above-bounden First Lieut. Henry W. Howgate, 20th infantry, has been assigned to duty as a property and disbursing officer, Signal Service, U. S. A.; has accepted said assignment: Now, if the said 1st Lieut. Henry W. Howgate, 20th infantry, shall and doth at all times

henceforth and during his holding and remaining in said office carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same, and for all public property which shall or may come into his hands on account of Signal Service U. S. Army, without fraud or delay, then the
21 above obligation to be void; otherwise to remain in full force and virtue.

HENRY W. HOWGATE. [L. S.]
LEBBEUS H. ROGERS. [L. S.]
W. B. MOSES. [L. S.]

Signed and delivered in the presence of—
JAMES H. SWIFT,
ANSON MALTBY,
Witness as to Lebbeus H. Rogers.
JAMES A. SWIFT,
Witness as to W. B. Moses.

STATE OF NEW YORK, *City and County of New York,* } ss:

I, Lebbeus H. Rogers, of the city of New York, in the county of New York and State of New York, one of the sureties on the within bond, being first duly sworn, depose and say that I am worth twelve thousand dollars over and above all my debts and liabilities.

LEBBEUS H. ROGERS.

Subscribed and sworn to before me this 13th day of March, 1878, at New York city.

[Notary Public Seal No. 5.]

ANSON MALTBY,
Notary Public, N. Y. C. & Co.

State of DISTRICT OF COLUMBIA, *County of Washington,* } ss:

I, William B. Moses, of the city of Washington, in the county of Washington and District of Columbia, one of the sureties on the within bond, being first duly sworn, depose and say that I am
22 worth twelve thousand dollars over and above all my debts and liabilities.

W. B. MOSES.

Subscribed and sworn to before me this 14th day of March, 1878, at Washington, D. C.

W. T. JOHNSON,
Notary Public.

[NOTARIAL SEAL.]

They also put in evidence a stipulation, of which the following is a copy:

United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
LEBBEUS H. ROGERS.

It is hereby stipulated by and in behalf of the defendant, Lebbeus H. Rogers, that upon the trial of this action the defendant will admit, as a matter of fact, that late First Lieutenant Henry W. Howgage, 20th infantry, while acting as property and disbursing officer, Signal Service, U. S. Army, did not carefully discharge the duties thereof and faithfully expend all public moneys and honestly account for the same, and for all public property which came into his hands, but did fraudulently and with intent to defraud the plaintiffs embezzle the sum of $133,255.22.

And it is further admitted that the said Henry W. Howgate, late first lieutenant 20th infantry and property and disbursing officer, Signal Service, U. S. Army, is indebted to the United States of America for moneys received as property and disbursing officer, Signal Service, U. S. Army, between the first day of April,
23 1878, and the 31st day of September, 1881, in the sum of $133,255.22.

BLISS & SCHLEY,
Defendant's Attorneys.

They also put in evidence papers of which the following are copies:

First.

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *May 14th*, 1867.

Special orders
No. 246.

(Extract.)

* * * * * * *

2. 2d Lieutenant L. B. Norton, 30th U. S. infantry, is hereby assigned to duty as property and disbursing officer at the office of the signal officer, Washington, D. C., to date from May 7th, 1867.

* * * * * * *

By order of the Secretary of War:
(Signed) E. D. TOWNSEND,
Assistant Adjutant General.

True copy.

L. B. NORTON,
2d Lt. 30th Inf., Bvt. Lt. Col., &c.

Taken from copy in hands of Lieut. L. B. Norton, May 22d, 1867.

Second.

HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *April* 18, 1868.

Special orders No. 93.

(Extract.)

* * * * * * *

7. 2d Lieutenant Henry W. Howgate, 20th U. S. infantry,
24 will report to the chief signal officer of the army for duty.

* * * * * * *

By command of General Grant:

E. D. TOWNSEND,
Assistant Adjutant General.

Official:

____ ____,
Assistant Adjutant General.

Chief signal officer, U. S. A.
(Rec'd, O. C. S. O., April 20th, 1868.)

Third.

WAR DEPARTMENT,
OFFICE OF THE CHIEF SIGNAL OFFICER,
WASHINGTON, D. C., *July* 25, 1876.

Special orders No. 115.

* * * * * * *

2. 1st Lieutenant H. W. Howgate, 20th infantry, brevet captain U. S. A., acting signal officer and assistant, is hereby assigned to duty as property and disbursing officer at this office, together with such other duties as may be assigned to him.

3. 1st Lieutenant Henry Jackson, 7th cavalry, acting signal officer and assistant, is hereby relieved from duty as property and disbursing officer at this office, and will turn over all Government property and funds pertaining to this office for which he is responsible to 1st Lieutenant H. W. Howgate, 20th infantry, brevet captain U. S. A., acting signal officer and assistant, who will receive and receipt for the same.

By order of the chief signal officer of the army:

GARRICK MALLERY,
Captain 1st Inf'y, Bvt. Lieut. Col. U. S. A.,
Acting Signal Officer and Assistant.

25 It was admitted that Howgate was an officer of the Regular Army of the United States.

The evidence for the plaintiffs being closed, defendant's counsel,

without offering any testimony, moved the court to direct a verdict for defendant on the ground that, as matter of law, no action could be maintained by the United States upon the bond proved; but the court refused to grant such motion; to which refusal the defendant's counsel then and there duly excepted.

And thereafter the court rendered a decision in favor of the plaintiffs and against the defendant for the sum of twelve thousand dollars and interest from 31st March, 1885; to which decision and finding the defendant duly excepted.

And forasmuch as the exceptions, matters, and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions, and it is—

Ordered that the same be filed as part of the record herein.

Witness my hand, at the city of New York, this 9th day of April, 1887.

ADDISON BROWN.

United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
LEBBEUS H. ROGERS.

This cause having come on to be tried on the 7th day of
26 June, 1886, at a stated jury term of this court, and a jury trial having been waived in open court, and the cause having been, by consent of both parties, tried by the court without a jury, and the testimony of witnesses and the arguments of counsel having been duly heard and due deliberation having been had thereon, and the judge before whom the cause was tried having duly made his findings of fact and conclusions of law, and the same having been duly filed, wherein and whereby judgment is directed in favor of the plaintiff and against the defendant for the sum of thirteen thousand four hundred and seventy-six dollars and costs;

And plaintiff's costs having been duly taxed, upon notice, at the sum of thirty $\frac{87}{100}$ dollars—

On motion of Stephen A. Walker, plaintiff's attorney for the southern district of New York—

It is ordered and adjudged that the plaintiff, The United States of America, have judgment against the defendant, Lebbeus H. Rogers, for the sum of thirteen thousand four hundred and seventy-six dollars, damages, and thirty $\frac{87}{100}$ dollars, costs, amounting in the aggregate to the sum of thirteen thousand five hundred and six $\frac{87}{100}$ dollars, and that it have execution therefor.

(Signed) SAMUEL H. LYMAN, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the district court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said district court, before you or some of you, between The United States of America, plaintiff, against Lebbeus H. Rogers, defendant, a manifest error hath happened, to the great damage of the said Lebbeus H. Rogers,
27 defendant, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the circuit court of the United States for the southern district of New York, at the U. S. court building, in the city of New York, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the third Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the said circuit court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States *for the southern district of New York*, this 6th day of May, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

ADDISON BROWN.

UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States for the southern district of
28 New York, to be holden at New York on the third Monday of October, eighteen hundred and eighty-seven, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the southern district of New York, wherein Lebbeus H. Rogers is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated May 6th, 1887.

ADDISON BROWN.

United States Circuit Court, Southern District of New York.

LEBBEUS H. ROGERS, Plaintiff in Error,
against
THE UNITED STATES, Defendant in Error.

Afterwards, to wit, on the third Monday of October in the same

term, before the justices of the said court, at the United States court building, in the city of New York, comes the said plaintiff in error, by Bliss & Schley, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error, against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff, against the said defendant.

29 And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

BLISS & SCHLEY,
Attorneys for Plaintiff in Error.

Circuit Court of the United States, Southern District of New York.

LEBBEUS H. ROGERS, Plaintiff in Error,
against
THE UNITED STATES, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the third Monday of October, in said term, the said defendant in error, by Stephen A. Walker, U. S. attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said circuit court, before the justice thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
U. S. Attorney, Attorney for Defendant in Error.

30 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE UNITED STATES OF AMERICA, Plaintiffs,
vs.
LEBBEUS H. ROGERS, Defendant. } Bond for Damages and Costs.

Know all men by these presents that we, Lebbeus H. Rogers, Joseph M. De Veau, and John A. Eagleson, are held and firmly bound unto the above-named plaintiffs in the sum of twenty-seven thousand dollars, to be paid to the said plaintiffs; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the sixth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named Lebbeus H. Rogers has prosecuted a writ of error to the circuit court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Lebbeus H. Rogers shall prosecute his writ of error to effect and answer all damages and costs if he fail to make
31 his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LEBBEUS H. ROGERS. [L. S.]
JOS. M. DE VEAU. [L. S.]
JOHN A. EAGLESON. [L. S.]

Sealed and delivered and taken and acknowledged this sixth day of May, 1887, before me—

GEORGE H. LIVERMORE,
[L. S.] *Notary Public* (*No.* 84), *N y York County.*

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Joseph M. De Veau and John A. Eagleson, being duly sworn, each for himself deposes and says that he is worth the sum of twenty-seven thousand dollars over and above all his just debts and liabilities.

JOS. M. DE VEAU.
JOHN A. EAGLESON.

Sworn to this sixth day of May, A. D. 1887, before me—

GEO. H. LIVERMORE,
[L. S.] *Notary Public* (*No.* 84), *New York County.*

32 U. S. District Court, Southern District of New York.

UNITED STATES *against* ROGERS.

At law.

Stephen A. Walker, U. S. att'y, and G. E. P. Howard, ass't U. S. att'y, for the U. S.

Geo. Bliss, for defendant.

BROWN, *J.:*

This suit is brought against the defendant as a surety on an official bond for $12,000, dated March, 1878, and given by Henry W. Howgate as a property and disbursing officer of the Signal Service in the United States Army, conditioned for the faithful discharge of the duties of that office and for the faithful expenditure and honest accounting for all public moneys and public property which should

business is such a contract. U. S. *v.* Tingey, 5 Pet., 115; U. S. *v.* Bradley, 10 Pet., 343; Tyler *v.* Hand, 7 How., 573; U. S. *v.* Hodson, 10 Wall., 395; U. S. *v.* Mora, 97 U. S., 413; Jessup *v.* U. S., 106 U. S., 147, 1 Sup. Ct. Rep., 74; Match Co. *v.* U. S., 31 Fed. Rep., 271. Hence, there being no question that the bond in suit was a voluntary one, the obligor is liable if it was taken to indemnify the Government against the miscarriage of an officer or of an agent or employé who was to be intrusted with money or property in the course of a lawful employment, and the terms of the bond are adequate and a breach has been shown.

It may be conceded, as is asserted for the plaintiff in error, that when the bond was given there was no such office under the Government as that described in the bond. In other words, that no such office had been specifically created by act of Congress, and no act had been passed authorizing the President or the head of a department to appoint an incumbent, and therefore within
38 the decision of U. S. *v.* Germaine, 99 U. S., 508, Howgate was not an "officer" and did not hold an office while the bond was in force. Assuming this, the bond must be treated as a contract to secure the Government against loss from the unfaithfulness of an employé in the Signal Service who was about to be intrusted with public money in the course of his employment. The obligor, as well as the obligee, is presumed to have known the law. He knew that Howgate could not have been appointed to an office and that what was termed an "office" in the bond described merely an employment. The recitals and the condition evince unequivocally an intention on the part of the Government to exact, and of the obligor to give, indemnity, whereby the obligor was to pay not exceeding the penalty of the bond in case Howgate should not faithfully expend and account for the money coming into his hands while discharging the duties to which he had been assigned. As is said by the court in U. S. *v.* Germaine, nine-tenths of the persons rendering service are agents or employés working for the Government and paid by it without thereby becoming its officers. When the plaintiff in error undertook to become responsible for the fidelity of one of these employés "during his holding and remaining in said office" he must have understood that his responsibility extended to a miscarriage of the employé while exercising the duties to which he had been assigned. These duties were characterized with sufficient accuracy, for practical purposes, in the bond as those of a property and disbursing officer.

There is no error and the judgment of the district court is affirmed, with costs.

39 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 5th day of Jan'y, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Wm. J. Wallace, circuit judge.

LEBBEUS H. ROGERS, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

This cause having been argued on the writ of error by Mr. Roger M. Sherman, for the plaintiff in error, and Mr. Abram J. Rose, for the defendant in error, and due deliberation having been had,
40 it is ordered that the judgment of the district court be, and the same is hereby, in all things affirmed with costs to the defendant in error, to be taxed.

WM. J. WALLACE.

Endorsed: U. S. circuit court, southern district of New York. Lebbeus H. Rogers, pl'ff in error, *vs.* The United States, def't in error. Original order of affirmance. Stephen A. Walker, United States attorney, attorney for defendant. Sir: You will please take notice that the order of affirmance, of which the within is a copy, was this day duly entered in the within-entitled action in the office of the clerk of the circuit court for the southern district of New York. Dated N. Y., Jan. —, 1888. Yours, &c., —— ——. To —— ——, attorney for pl'ff in error. Filed Jan'y 6, 1888.

41 And now, at this day, to wit, on the third Monday of October, in the year one thousand eight hundred and eighty-seven, before the judges of the said circuit court of the United States, now here, come the said Lebbeus H. Rogers, by Bliss & Schley, his attorneys, and say that in giving the judgment aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in the form aforesaid given was given for the said The United States of America against the said Lebbeus H. Rogers, whereas by the law of the land the said judgment ought to have been given for the said Lebbeus H. Rogers and against the said United States of America.

And the said Lebbeus H. Rogers prays that the judgment aforesaid for the errors aforesaid may be reversed, annulled, and
42 altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, &c.

And hereupon the said The United States of America, by Stephen A. Walker, their attorney, freely come here into court and say that there is no error in giving the judgment aforesaid, and they pray that the said circuit court of the United States, before the aforesaid judges thereof, now here, may proceed to examine matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

But because the said court before the aforesaid judges thereof, now here, are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid before
43 the said judges at the United States court and post-office building, in the city of New York, in said southern district, in the second circuit, on the 19th day of Oct., one thousand eight hundred and eighty-seven, as yet of April term, in the year one

thousand eight hundred and eighty-seven, to hear judgment thereon, for that the said court now here are not yet advised thereof, &c., at which day, before the judges of the circuit court of the United States aforesaid, at the United States court and post-office building, in the city of New York, in the said southern district, came the parties aforesaid, by their attorneys aforesaid, whereupon as well the records and proceedings aforesaid and the judgment given in form aforesaid as the matters aforesaid by the said Lebbeus H. Rogers above for error assigned being seen and by the said circuit court,

before the aforesaid judges thereof, now here, fully seen
44 and understood, and mature deliberation being thereupon had, it appears to the said court, before the aforesaid judges thereof, now here, that there is no error either in the record and proceedings aforesaid, but that the said judgment should be in all things affirmed.

Therefore it is considered that the judgment aforesaid, in form aforesaid given, be in all things affirmed and stand in full force and effect, the several matters above for error assigned in anywise notwithstanding.

And it is further considered that the said The United States of America do recover against the said Lebbeus H. Rogers as well their

damages, costs, and charges adjudged to them by the said
45 judgment aforesaid, as also five hundred and thirty-one dollars and seventy-five cents, adjudged to them by the said circuit court before the aforesaid judges thereof, now here, for their damages, costs, and charges which they have sustained and expended by reason of the delay of execution of the judgment aforesaid and on pretence of the prosecution of the said writ of error, which said damages, costs, and charges in the whole amount to fourteen thousand and thirty-eight dollars and sixty-two cents, and

that the said The United States of America have execution
46 thereof, &c., and the said Lebbeus H. Rogers in mercy, &c.

Judgm't signed this 6th day of January, 1888.

JOHN A. SHIELDS, *Dep'y Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York. Lebbeus H. Rogers, pl'ff in error, *vs.* The United States, def't in error. *Postea.* Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. U. S. circuit court. Filed Jan'y 6th, 1888. Timothy Griffith, clerk.

47 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 26th day of March, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Wm. J. Wallace, judge.

LEBBEUS H. ROGERS, Pl'ff in Error,
vs.
THE UNITED STATES, Def't in Error.

The plaintiff in error having heretofore, on the 6th day of Jan'y, 1888, obtained an order requiring the defendant in error to show cause herein why an order should not be made herein directing a reargument of this cause and staying all proceedings herein until the hearing and decision of said motion; and, on the return of said order to show cause, the motion for reargument having been brought to hearing, and after hearing George Bliss, Esq., of counsel for said motion, and Abram J. Rose, ass't U. S. attorney, in opposition, and due deliberation being had, it is now, on motion of Stephen A. Walker, United States attorney—

Ordered that the motion for a reargument of this cause on
48 the writ of error herein be, and the same is hereby, denied.

And it is further ordered that the stay of proceedings contained in said order to show cause of Jan'y 6th, 1888, be, and the same hereby is, in all things vacated.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. Lebbeus H. Rogers, pl'ff in error, *versus* The United States, def't in error. Order denying motion for reargument and vacating stay. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Mar. 26, 1888. Timothy Griffith, clerk.

49 Supreme Court of the United States.

LEBBEUS H. ROGERS, Plaintiff in Error,
ag'st
THE UNITED STATES OF AMERICA, Defendants in Error.

Afterwards, to wit, on the third Monday of the October term, 1888, before the justices of the said court, at the Capitol in Washington, comes the said plaintiff in error, by Bliss & Schley, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas by the laws of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment.

BLISS & SCHLEY,
Attorneys for Plaintiff in Error.

50 (Endorsed:) Supreme Court of the United States. Lebbeus H. Rogers, plaintiff in error, against The United States,

The United States, defendant in error. Citation. Bliss & Schley, attorneys for plaintiff in error, 160 Broadway, New York. Please take notice that the within is a copy of — this day duly entered and filed herein in the office of the clerk of ——. Dated —— —, 188–. Bliss & Schley, attorneys for ——. To —— ——. Service of a copy of the within and notice above is hereby admitted. Stephen A. Walker, U. S. att'y. [Stamped:] U. S. circuit court. Filed Apr. 16, 1888. Timothy Griffith, clerk. Due service of a copy of the within citation is hereby admitted this — day of April, 1888.

Endorsed on cover: S. New York C. C. U. S. No. 78. Lebbeus H. Rogers, plaintiff in error, *vs.* The United States. Filed August 21, 1888.

FILED.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

SUPREME COURT OF THE UNITED STATES.

LEBBEUS H. ROGERS,
Plaintiff in Error.

AGAINST

THE UNITED STATES,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The writ of error here is sued out to review a judgment in favor of the United States, rendered in the Circuit Court for the Southern District of New York, upon a writ of error from the District Court in said District upon a trial without a jury. The judgment is against a surety upon an official bond.

The bond purports to have been given in March, 1878, upon the assignment of Henry W. Howgate, a lieutenant of infantry in the U. S. Army, to duty as Property and Disbursing Officer, Signal Service, U. S. Army.

Lieut. Howgate is concededly a defaulter to more than the amount of the penalty of the bond.

The facts in the case were proved by the United States. They are embodied in findings and stated in the opinion of Judge BROWN.

Lieut. Howgate was ordered to report to the Chief Signal Officer of the Army for duty by Special Orders No. 93, April 18, 1868 (Record, fol. 24).

He was *assigned* to duty as Property and Disbursing Officer July 25, 1876, and Lieutenant Jackson was then relieved from duty as such, *by order of the Chief Signal Officer of the Army* (Record, fol. 24, 68). This is the authority relied on for his incumbency of the office.

A predecessor in this office was appointed thereto May 14, 1867, *by order of the Secretary of War.* (Record, fol. 23).

The question raised is whether the bond is valid. Its validity is attempted to be supported, *first*, by the claim that the bond is an official bond authorized by statute, and *second*, that it is a voluntary bond and binding at common law.

The plaintiff in error contends, *first*, that there was no such office known to the law; that if there was it could be filled only by appointment by the head of a department; in this instance by the Secretary of War. There being no such office nor any incumbent lawfully appointed thereto, the bond to secure Howgate's fidelity "during his holding and remaining in said office" is void. And, *second*, that the bond was not a voluntary bond, so as to be valid independently of statute.

The Circuit Judge places his decision upholding the judgment chiefly upon the ground that the bond was a voluntary bond (Record, folio 36).

The District Judge (Record, folio 33) places his decision chiefly upon the ground that there was an office held by Howgate, though he refers also to the other ground.

POINTS.

I.

We concede to their full extent the principles and authority cited by Judge BROWN (Record, folio 34) and by Judge WALLACE (folio 37). We concede that a bond given by a person appointed to an office of pecuniary trust under the Government of the United States, requires no express statute to support it. We concede that its support may be found in and must be judged by the principles of the common law. We concede the competency of the Government through the proper

offices to make any contract not prohibited by law, and appropriate to the just exercise of its powers.

But the cases cited by Judge BROWN, and many others, establish that in a suit upon such a bond it is a good defense that the officer was not legally appointed.

Thus in

U. S. vs. Tingey, 5 *Peters*, *120*, *121*, *128*;

a plea of that kind is tacitly admitted to be good, being disposed of as raising a material issue.

See also

U. S. vs. Van Zandt, *11 Wheat*, *184*, *190*.
U. S. vs. Nicholl, *12 Wheat*, *505*, *509*.
Cox vs. U. S., *6 Peters*, *172*, *203-4*.
U. S. vs. Bradley, *10 Peters*, *360*, *364*, *365*.
U. S. vs. Kirkpatrick, *9 Wheat*, *733*.

STORY, J.: "Its obligatory force was confined to acts done while that commission was *in legal continuance* and could not go beyond it."

U. S. vs. Maurice, 2 Brock., 103.
U. S. vs. Bachelder, 2 *Ib.*, 15.
Sanford vs. Boyd, 2 Cr., C. C., 78.
Ex parte Smith, *Ib.*, 693.

It results further from these cases that a contract made in violation of law, or which is an incident to or in aid of a violation of law, or to give color of legality thereto, is tainted, *malum in se* and void.

See also

Cox vs. U. S., 5 Peters, 172, 203, 204.
Saxton vs. Dodge, 57 Barb., 84, 114.
Hannay vs. Eve, 3 Cranch, 242.
U. S. vs. Owens, 2 Pet., 527.
Craig vs. Missouri, 4 Pet., 410.
Byrne vs. Missouri, 8 *Ib.*, 40.
Armstrong vs. Toler, 11 Wheat, 258.
Kennett vs. Chambers, 14 How., 38.
Radich vs. Hutchins, 95 U. S., 210.

And a participant in the illegal transaction is not estopped from setting it up.

Armstrong vs. Toler, 11 Wheat., 258.
Nellis vs. Clark, 20 Wend., 24.
De Witt vs. Brisbane, 16 N. Y., 508.
U. S. vs. Grossmayer, 9 Wall., 72.
Saxton vs. Dodge, *supra* 114.

He was *assigned* to duty as Property and Disbursing Officer July 25, 1876, and Lieutenant Jackson was then relieved from duty as such, *by order of the Chief Signal Officer of the Army* (Record, fol. 24, 68). This is the authority relied on for his incumbency of the office.

A predecessor in this office was appointed thereto May 14, 1867, *by order of the Secretary of War.* (Record, fol. 23).

The question raised is whether the bond is valid. Its validity is attempted to be supported, *first*, by the claim that the bond is an official bond authorized by statute, and *second*, that it is a voluntary bond and binding at common law.

The plaintiff in error contends, *first*, that there was no such office known to the law; that if there was it could be filled only by appointment by the head of a department; in this instance by the Secretary of War. There being no such office nor any incumbent lawfully appointed thereto, the bond to secure Howgate's fidelity "during his holding and remaining in said office" is void. And, *second*, that the bond was not a voluntary bond, so as to be valid independently of statute.

The Circuit Judge places his decision upholding the judgment chiefly upon the ground that the bond was a voluntary bond (Record, folio 36).

The District Judge (Record, folio 33) places his decision chiefly upon the ground that there was an office held by Howgate, though he refers also to the other ground.

POINTS.

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See also

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U. S. vs. Bradley, *10 Peters*, *360*, *364*, *365*.
U. S. vs. Kirkpatrick, *9 Wheat*, *733*.

STORY, J.: "Its obligatory force was confined to acts done while that commission was *in legal continuance* and could not go beyond it."

U. S. vs. Maurice, 2 Brock., 103.
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Kennett vs. Chambers, 14 How., 38.
Radich vs. Hutchins, 95 U. S., 210.

And a participant in the illegal transaction is not estopped from setting it up.

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He was *assigned* to duty as Property and Disbursing Officer July 25, 1876, and Lieutenant Jackson was then relieved from duty as such, *by order of the Chief Signal Officer of the Army* (Record, fol. 24, 68). This is the authority relied on for his incumbency of the office.

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The question raised is whether the bond is valid. Its validity is attempted to be supported, *first*, by the claim that the bond is an official bond authorized by statute, and *second*, that it is a voluntary bond and binding at common law.

The plaintiff in error contends, *first*, that there was no such office known to the law; that if there was it could be filled only by appointment by the head of a department; in this instance by the Secretary of War. There being no such office nor any incumbent lawfully appointed thereto, the bond to secure Howgate's fidelity "during his holding and remaining in said office" is void. And, *second*, that the bond was not a voluntary bond, so as to be valid independently of statute.

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The District Judge (Record, folio 33) places his decision chiefly upon the ground that there was an office held by Howgate, though he refers also to the other ground.

POINTS.

I.

We concede to their full extent the principles and authority cited by Judge BROWN (Record, folio 34) and by Judge WALLACE (folio 37). We concede that a bond given by a person appointed to an office of pecuniary trust under the Government of the United States, requires no express statute to support it. We concede that its support may be found in and must be judged by the principles of the common law. We concede the competency of the Government through the proper

offices to make any contract not prohibited by law, and appropriate to the just exercise of its powers.

But the cases cited by Judge BROWN, and many others, establish that in a suit upon such a bond it is a good defense that the officer was not legally appointed.

Thus in

U. S. vs. Tingey, 5 *Peters*, *120*, *121*, *128*,

a plea of that kind is tacitly admitted to be good, being disposed of as raising a material issue.

See also

U. S. vs. Van Zandt, *11 Wheat*, *184*, *190*.
U. S. vs. Nicholl, *12 Wheat*, *505*, *509*.
Cox vs. U. S., *6 Peters*, *172*, *203-4*.
U. S. vs. Bradley, *10 Peters*, *360*, *364*, *365*.
U. S. vs. Kirkpatrick, *9 Wheat*, *733*.

STORY, J.: "Its obligatory force was confined to acts done while that commission was *in legal continuance* and could not go beyond it."

U. S. vs. Maurice, 2 Brock., 103.
U. S. vs. Bachelder, 2 *Ib.*, 15.
Sanford vs. Boyd, 2 Cr., C. C., 78.
Ex parte Smith, *Ib.*, 693.

It results further from these cases that a contract made in violation of law, or which is an incident to or in aid of a violation of law, or to give color of legality thereto, is tainted, *malum in se* and void.

See also

Cox vs. U. S., 5 Peters, 172, 203, 204.
Saxton vs. Dodge, 57 Barb., 84, 114.
Hannay vs. Eve, 3 Cranch, 242.
U. S. vs. Owens, 2 Pet., 527.
Craig vs. Missouri, 4 Pet., 410.
Byrne vs. Missouri, 8 *Ib.*, 40.
Armstrong vs. Toler, 11 Wheat, 258.
Kennett vs. Chambers, 14 How., 38.
Radich vs. Hutchins, 95 U. S., 210.

And a participant in the illegal transaction is not estopped from setting it up.

Armstrong vs. Toler, 11 Wheat., 258.
Nellis vs. Clark, 20 Wend., 24.
De Witt vs. Brisbane, 16 N. Y., 508.
U. S. vs. Grossmayer, 9 Wall., 72.
Saxton vs. Dodge, *supra* 114.

II.

There is no such office known to the law as that of Property and Disbursing Officer in the Signal Service.

The sole authority therefor asserted by Judge BROWN is the language of the Appropriation Act of June 16, 1874.

We submit that that enactment does not bear the construction or application which he gives it.

Judge BROWN finds the genesis of the Signal Service of the Army in conjecture based upon a special order of the War Department, dated May 14, 1867, and he infers that the organization of the Signal Service which by the Act of 1874 is to be maintained, is that created by the War Department, and existing in 1867. Inasmuch as that service then had property and disbursing officers, independent of any authority of law then in force, Judge BROWN determined that the Act of 1874 gives legislative sanction to their continuance.

This view ignores the fact that the organization of the Signal Service was not the result of usage or custom in the War Department, but had been the subject of legislative enactment.

When Congress, by enactment, maintains a body as organized, it will hardly be held to refer to a condition of things unknown to the law existing in a department, if there is a iment for the statute in an antecedent statute.

The inception of the office of Signal Officer of the Army is found in the Act of June 21, 1860, 12 Stat., 66, which adds to the staff of the army one signal officer, with the rank, &c., of a major of cavalry, who shall have charge, under the direction of the Secretary of War, of all signal duty, &c.

The Act of February 22, 1862, 12 Stat., 344, authorized the assignment *to signal service duty* of officers of the army.

U. S. Rev. Stat., Sec. 1169, limits such details to "the performance of signal duty."

By the Act of March 3, 1863, Sec. 17, 12 Stat., 753, the signal corps of the army was organized. It was to consist, among others, of as many lieutenants, not exceeding eight, as the President may deem necessary. Its officers were to be appointed by the President, by and with the advice and consent of the Senate.

There is no such office as that of Property and Disbursing Officer alluded to in the act of organization. The organization thus

made was to continue during the rebellion. By Sec. 22 of the Act of July 28, 1866, 14 Stat., 335, this limitation was removed.

There is legislative recognition of this corps by appropriations and extension of its duties to meteorological service in the subsequent appropriation acts:

See Ch. 124, Act Meh. 3, 1864, 13 Stat., 129.
Ch. 81, Act Meh. 3, 1865, 13 Stat., 497.
Ch. 294, Act July 15, 1870, 16 Stat., 316.
Ch. 114, Act Meh. 3, 1871, 16 Stat., 507.
Ch. 115, Act same date, 16 Stat., 520.
Ch. 172, Act May 18, 1872, 17 Stat., 129.
Ch. 415, Act June 10, 1872, *Ib.*, 366.
Ch. 227, Act Meh. 3, 1873, *Ib.*, 527.
Ch. 228, Act Meh 3, 1873, *Ib.*, 535.

By U. S. Rev. St., Secs. 1195–1197, the organization of the signal service is again regulated by law. Here no such office is alluded to as that of Property and Disbursing Officer.

This brings us to the enactment referred to by Judge Brown.

The "organization" intended in the Act of 1874 is necessarily the organization by express enactment in the Act of 1863, embodied as the existing law on December 1, 1873, in the Revised Statutes, and is not the organization existing in the War Department without authority of law and contrary to law.

The *application* of the Act of 1874, made by the Court below, is not more unsound and inconsiderate than its construction of the *language* of that act. That act was not designed as authority for the maintenance of the signal service, on the theory that before that time, it had been the creature of the War Department and not of enactment. That enactment is a mere *proviso* to a section which restricts the number of enlisted men in the army to 25,000, and the whole office of the *proviso* is to prevent that restriction from operating to curtail the number of enlisted men in the signal service. The whole *proviso* is:

"Nothing, however, in this act shall be construed to diminish the signal service, which shall be maintained as now organized under the authority of the Secretary of War."

The next Act of March 3, 1875, 18 Stat., 452, emphasizes this as the scope of the proviso.

The Act of July 24, 1876, 19 Stat., 97, passed *the day before the date of Howgate's assignment to this office*, even more clearly shows

that this enactment relates solely to the number of enlisted men. It then goes on to say :

"Which shall hereafter be maintained as now organized *and as provided by law*," &c.

At the time of Howgate's assignment, therefore, the authority therefor was expressly required to be found in provisions of law.

It was required not only by the proper construction of the Acts of June 16, 1874, July 24, 1876, March 3, 1863, and Revised Statutes, Secs. 1195–1197. It was required by Section 2 of Article 2 of the Constitution of United States, which precludes the idea that there can be an officer of the United States without a positive law to establish the office.

That provision vests the appointment of all officers of the United States which shall be established by law in either the President, by and with the advice and consent of the Senate, or in the head of a Department. It excludes the idea, by necessary implication, of such a thing as a office not established by law.

U. S. vs. Maurice, 2 Brock., 103.

In harmony with this view the statutes contain many provisions which demonstrate that the authority for an office is to be found only in the provisions of a positive statute.

U. S. Rev. Stats., §§ 1760, 1768–1772.

It follows that the office of Property and Disbursing Officer in the Signal Service was not created nor authorized by law.

III.

But, assuming that Judge BROWN's view of the law is correct so far as he goes, it yet overlooks a vital point in this case.

The act of June 16, 1874, is a sufficient recognition and authority for the appointment of property and disbursing officers in the Signal Service, so he holds, because it gives legislative sanction to that service, as shown to have been organized in 1867 by the Special Order 246 issued by the Secretary of War.

But that order was an assignment to this office *made by the Secretary of War.*

If the statute maintained so much of the actual organization as related to this office, it required an appointment by the Secretary of War.

As well might Lieut. Howgate be assigned to duty as Paymaster in the Army as a duty pertaining to his office of Lieutenant of Infantry. The "Signal Service Duty" to which a lieutenant might be detailed under the Act of 1862, or the "signal duty" by the Rev. Stats., § 1196, is manifestly foreign to the duty of Paymaster or Disbursing Officer.

Judge BROWN rightly treats the assignment of Howgate by Special Order 115 as an appointment to office. It was necessary so to treat it to avoid the objection that the bond was not an incident to his office of Lieutenant of the Army, and could not be exacted from him in that capacity, and was, therefore, void. As the District Judge points out, the bond purports to be given in a distinct office, and the office was substantially distinct. It cannot be denied that the place has every characteristic of an office.

U. S. vs. Germaine, 99 U. S., 508.

An appointment thereto could, by virtue of the express provisions of the Constitution, Art. II., Sec. 2, only be authorized, even by Act of Congress, by either the President, &c., or the head of a department.

U. S. vs. Germaine, *supra.*

An appointment by the Secretary of War and not an assignment by the Chief Signal Officer of the army, was a necessary condition precedent to the "holding and remaining in said office." However valuable a preliminary an assignment might be, it was not an *appointment*, and not being made by the Secretary of War could not be construed into an appointment.

Here, then, was an attempt in violation of the Constitution and laws to confer an office upon Howgate; it was illegal and nugatory. In aid of it, indispenssable and inseparable part of it, to give color of legality thereto, this bond was given. The bond is no better than the special order 115; it cites merely an assignment, not an appointment. It is tainted, *malum in se* and void.

Consideration of the statutes *in pari materia* shows that this transaction was in violation of a well settled public policy.

The Act of March 3, 1809, 1 Statute, 536, Sec. 3, provides that no permanent agents for the disbursement of moneys for the use of the military establishment shall be appointed but by the President of the United States with the advice and consent of the Senate. This act was in force until the Revised Statutes were passed. It was in force in 1867, when Special Order 246 was made and that special order was in violation of that statute.

As Howgate was not a paymaster of the army, this act would apply to him were it not for the repealing provisions of

U. S. Rev. St., § 5596.

The policy of the law to vest the appointment of persons entrusted with the disbursement of public moneys in the President was thus continually maintained, and the repeal in the Revised Statutes, which re-enact parts of the Act of 1809, is evidently only because special provision is made in the case of each such office.

It is only inferior disbursing officers or disbursing clerks in the Department that may be appointed otherwise than by the President and even these clerks can only be appointed by the head of a Department.

U. S. Rev. St., § 176.

The policy of the Government has been to make disbursements of funds appropriated for the use of the army through the pay department of the army. Act March 2, 1849, 9 Stat. 350 (Rev. Stat., Secs. 1182–1192). The existing machinery was adequate to disburse the appropriation of the Signal Service.

It would be strange indeed if the law which requires a clerk through whose hands the stationary and incidental expenses of a department are paid to be appointed by the head of a Department and to give a prescribed bond, permitted the annual $250,000 of the Signal Service to pass through the hands of a lieutenant of infantry assigned to that unmilitary duty by the order of a subordinate officer of the army upon such a bond as he may please to subscribe. Such a departure from an established public policy is to be found in nothing short of positive enactment, even if the Constitution tolerates such a law, and certainly cannot be found in the construction of a proviso to a limitation of the number of enlisted men in the army.

IV.

Judge WALLACE in effect abandons Judge BROWN'S chief contention that Howgate held an office (Record, folio 37), and resting his decision upon the assertion made by him in violation of all the facts and of the argument below that "there being no question that the bond in suit was a voluntary one," affirms Judge BROWN'S decision.

But, in fact, we contend, and always have contended, that the bond was not a voluntary one. Howgate, a lieutenant in the army, was, on April 18, 1868, ordered by the General-in-Chief to "report to the chief signal officer of the army for duty" (Record, folio 24). Having so reported, he was by the chief signal officer made acting signal officer and assistant, was then "assigned to duty as property and disbursing officer at the office" (folio 24). As such disbursing officer, he was required to give the bond in suit.

Such a bond is in no sense voluntary. He was placed under the orders of the chief signal officer, and that officer in effect ordered him to give a bond. If he had refused to obey his superior, he would have been liable to court martial, and, though *possibly* he could have defended himself on the ground that the order was unauthorized, still a bond given to avoid exposing himself to a court martial and possible punishment can in no proper sense be called a voluntary bond. He gave the bond simply because he had so to do.

V.

The judgment below should be reversed.

GEORGE BLISS,
Of Counsel.

BLISS & SCHLEY,
Attorneys for Plaintiff in Error.

Office Supreme Court, U.S.
FILED,
NOV 2 1891
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

LEBBEUS H. ROGERS, PLAINTIFF in error,
vs.
THE UNITED STATES.
No. 78.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the circuit court of the United States for the southern district of New York, affirming a judgment of the district court in favor of the United States for $13,506.87 against Lebbeus H. Rogers. Rogers was one of the sureties upon the bond of Henry W. Howgate to the United States. The condition of the bond was that Howgate should faithfully perform all the duties of property and disbursing officer, in the

Signal Service, U. S. Army, and faithfully expend all public moneys and honestly account for the same and all property coming into his hands on account of the Signal Service. The breach assigned in the complaint was that Howgate had embezzled $133,000 of public moneys coming into his hands on account of the Signal Service. The only defense relied on in the answer was that the bond was without authority of and in violation of law. There was no averment in the answer that the bond was not voluntarily given.

The facts and conclusions of law found by District Judge Brown are as follows (Rec., p. 849):

FINDINGS OF FACT.

1st. That long prior to 1874 the Signal Corps, under the Department of War, was organized, and has continued from its organization to the present time under such Department; that during such time such Signal Corps has had property and disbursing officers.

2d. That prior to 25th July, 1876, one Henry W. Howgate was a first lieutenant of the 20th infantry of the United States Army, attached to the Signal Corps.

3d. That on the 25th July, 1876, said Howgate by a special order as follows:

"WAR DEPARTMENT,
"OFFICE OF THE CHIEF SIGNAL OFFICER,
"*Washington, D. C.*, July 25, 1876.

"Special Orders, }
"No. 115. }

"2. First Lieutenant H. W. Howgate, 20th Infantry, brevet captain U. S. A., acting signal officer

and assistant, is hereby assigned to duty as property and disbursing officer at this office, together with such other duties as may be assigned to him.

"3. First Lieutenant Henry Jackson, 7th Cavalry, acting signal officer and assistant, is hereby relieved from duty as property and disbursing officer at this office, and will turn over all Government property and funds pertaining to this office for which he is responsible to First Lieutenant H.W. Howgate, 20th Infantry, brevet captain U. S. A., acting signal officer and assistant, who will receive and receipt for the same.

"By order of the Chief Signal Officer of the Army:

"GARRICK MALLERY,

"*Captain 1st Inf'y, Bvt. Lieut. Col. U. S. A.,*

"*Acting Signal Officer and Assistant.*"

was assigned to duty as property and disbursing officer in the office of the Chief Signal Officer, and he voluntarily accepted such assignment and entered upon the duties thereof.

4th. That in March, 1878, said Howgate, as principal, and the defendant, as one of the sureties, executed and delivered the bond mentioned in, and a copy of which is annexed to, the complaint in this action.

5th. That such bond is in the penal sum of $12,000 and is conditioned as follows: "That whereas the above-bounden First Lieut. Henry W. Howgate, 20th Infantry, has been assigned to duty as a property and disbursing officer, Signal Service, U. S. A., —has accepted said assigment: Now, if the said First Lieut. Henry W. Howgate, 20th Infantry, shall and doth at all times henceforth and during his holding and remaining in said office carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same and for all public

property which shall or may come into his hands on account of Signal Service, U. S. Army, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue."

6th. That said Henry W. Howgate, 20th Infantry, while acting as property and disbursing officer, Signal Service, U. S. Army, did not carefully discharge the duties thereof and faithfully expend all public moneys and honestly account for the same and for all public property which came into his hands, but did fraudulently and with intent to defraud the plaintiffs embezzle the sum of $133,255.52.

7th. That the said Howgate is indebted to the United States of America for moneys received as property and disbursing officer, Signal Service, U. S. Army, between the first day of April, 1878, and 31st day of September, 1881, in the sum of $133,255.52.

8th. That such bond was made, executed, delivered, and given by said Howgate and the defendant and the other surety voluntarily.

9th. That there is now due on said bond the sum of $12,000, with interest from 31st March, 1885, making in all $13,476.

CONCLUSIONS OF LAW.

1st. That the office of property and disbursing officer, Signal Service, U. S. Army, is one created and duly authorized by law.

2d. That the duties assigned to such officer are duly authorized by law.

3d. That duties covered by the bond in this action are authorized by law.

4th. That the bond in the complaint mentioned is a legal, valid obligation.

5th. That the plaintiff is entitled to judgment against the defendant for the sum of $12,000, with

interest from March 31, 1885, amounting in all to $13,476, for which sum judgment is ordered, with costs.

Dated April 18, 1887.

ADDISON BROWN.

CONTENTION OF PLAINTIFFS IN ERROR.

At the time of writing this brief we have not had the opportunity of seeing the brief of counsel for the plaintiff in error. From a memorandum of points made in the courts below, however, we understand their contention to be that there was no law under which Howgate could act as disbursing officer in the Signal Service, and therefore that the bond is void. It is said that an office can only be filled under the Constitution by the President and Senate unless otherwise provided by law, in which case the appointment may be vested in the President alone, the heads of Departments, or the courts of law. In this case Howgate was assigned to duty by the Chief Signal Officer, who it was said could not make a valid appointment. The argument then is that the bond was made to further the payment of funds from the Treasury to Howgate, which was illegal; therefore the bond was void. It is said to be against the policy of the law to make an Army officer a disbursing officer, and therefore that the bond is against public policy and void.

ARGUMENT FOR THE UNITED STATES.

The Signal Service of the Army was first established by a clause in the Army appropriation act of June 21,

1860 (12 Stat. L., 66). Further provisions were made for the service in the act of February 22, 1862 (12 Stat. L., 344), and in sections 17, 18, and 19 of the act of March 3, 1863 (12 Stat. L., 753). Section 22 of the act to fix the military and peace establishment of the United States, approved July 28, 1866 (14 Stat. L., 335), provided an organization of the Signal Service, which was afterwards embodied in the Revised Statutes, and continues, down to the present, substantially the same, though it has been changed in some respects from time to time. (See sections 221, 222, 223, 227, 1094, 1195, 1196, and 1197 of the Revised Statutes.) The organization includes a chief signal officer, with the rank of a colonel of cavalry at its head, and a detail of 6 other Army officers, with 100 noncommissioned officers and privates assigned to duty under the chief. Under direction of the Secretary of War the Chief Signal Officer is given charge of all signal duty, and custody and control of all the books, papers, and apparatus of that service.

The Signal Service was a purely military branch down to February 9, 1870, with a bureau office in the War Department at Washington; that is, the office of the Chief Signal Officer. By joint resolution of February 9, 1870, the Secretary of War was authorized and required to provide for taking meteorological observations at the military stations in the interior of the continent, and at other points in the States and Territories of the United States, and for giving notice on the northern lakes and the seacoast by magnetic telegraph and marine signal of the approach and force of storms.

The army appropriation act of July 15, 1870, appropriated $5,000 for the expenses of the Signal Service of

the Army and $50,000 for taking meteorological observations and giving notice on the northern lakes and seaboards of the approach and force of storms.

The sundry civil appropriation act of March 3, 1871 (16 Stat. L., 507), provided, under the War Department appropriation, for the expenditure of $102,451 for the manufacture, purchase, or repair of meteorological and other necessary instruments for telegraphing reports, for expenses of storm signals, announcing probable approach and force of storms, for instrument shelters, for hire, furniture, and expenses of offices maintained for public use in cities or posts receiving reports, for maps and bulletins to be displayed in chambers of commerce, boards of trade rooms; for books and stationery, and for other incidental expenses not otherwise provided for, with proviso that the rates for telegraphing should be established by the Postmaster-General.

From this time on large appropriations were made for the observation and report of storms by telegraph signals for the benefit of commerce and agriculture throughout the United States; the establishing of telegraph stations; the issue of maps and bulletins; and other incidental expenses of the service, as well as for the purely military expenses of the Bureau—all to be expended under the direction of the Secretary of War and the Chief Signal Officer of the Army. (See Army appropriation act July 15, 1870; Deficiency appropriation, March 3, 1871; Sundry civil act, June 10, 1872, 17 Stats., 366; Appropriation act, March 3, 1873, 17 Stats., 501; Sundry civil appropropriation act, March 3, 1873, 17 Stat., 501, act of June 23, 1874, 18 Stat., 223; Act of March 3, 1875, 18 Stat.,

388; Act of July 31, 1876, 19 Stat., 118; act of March 3, 1877, 19 Stat., 359; act June 20, 1878, 20 Stat., 219; act March 3, 1879, 20 Stat., 386; act June 16, 1880, 21 Stat., 266; act March 3, 1881, 20 Stat., 445).

It will thus be seen that during the years covered by Howgate's bond there were very large sums appropriated by Congress for the Signal Service, which it was the duty of some one to distribute, expend, and account for.

No provision is made in the laws applying to the Signal Service for the detail of any quartermaster or paymaster for duty in the Signal Service. Neither section 1118, Revised Statutes, nor those sections describing the duties of quartermasters (sections 1132–1139) had any application to disbursement of funds of the Signal Service. This was for the obvious reason that the character of the service was such as to make the ordinary military system of disbursements inapplicable. Members of the service were scattered singly the country over, and so were the property and apparatus. The quasi civil nature of the functions of the service required a special disbursing officer.

The difficulty was solved by assigning an Army officer regularly attached to the Signal Service to the duty of caring for its property and disbursing its funds in the office of the Chief Signal Officer. We do not think that this can be said to be creating a new office. The duty was one of the incidents of assignment to the Signal Service. An army officer was by reason of his office attached to the Signal Service, and by reason of being attached to the Signal Service was given disbursing duty. The Government had the right to secure honest disburse-

ment by a common-law bond. There was no law forbidding an assignment of such duty, and Howgate accepted it and voluntarily gave bond. The money which came into his hands he lawfully received, therefore, and could lawfully disburse.

If, however, the duty of disbursing officer was distinct from Howgate's duty as an army member of the Signal Service Corps and constituted a new employment or office, its existence was recognized and confirmed by act of Congress. There was a property and disbursing officer in the Signal Service Corps as far back as 1867, as shown by the Record, p. 12. He was an army officer attached to the corps. This was true in 1874, when, in the Army appropriation act approved June 16, 1874 (18 Stat., 72), it was provided, after a limitation upon the number of recruits, as follows:

> Nothing, however, in this act shall be construed to diminish the Signal Service, which shall be maintained as now organized under the authority of the Secretary of War.

This was a Congressional approval of the organization, which included a property and disbursing officer, and amounted to an establishment of the office by law. It is said that when the first assignment was made of disbursing duty it was in violation of Section 3 of the act of March 3, 1809 (1 Stat., 536), which was not repealed until the enactment of the Revised Statutes. The section referred to provided that no permanent agents for the disbursement of moneys for the use of the Military Establishment should be appointed, except by the President with the advice and consent of the Senate. The expenditure of money for the

Signal Service is not properly speaking, for the Military Establishment of the United States. Chief-Justice Marshall held that the expenditure of money for fortifications was not for the Military Establishment of the United States under this statute. (*The United States* vs. *Maurice*, 2 Brock, 104.) But the question is immaterial, because the act of 1809 was repealed before the act of June 16, 1874, was passed.

Even if the law does not make the position of disbursing agent for the Signal Service an office, it is an employment to which any person may be assigned by the Chief Signal Officer, whose duty it is to see that the funds of the Signal Service are disbursed. And to secure the performance of such a contract of employment, the United States may properly take a common law bond and enforce the same.

It is not disputed that the United States is a body politic and corporate, with the right to make such contracts as are reasonable and necessary in the exercise of its governmental powers. It must also be conceded that, whenever a contract is to be performed in its behalf, it may without express statutory authority secure that performance by accepting a common law bond with sureties properly conditioned. The principle is established by numerous decisions of this court.

United States vs. *Tingey*, 5 Peters, 115.
United States vs. *Bradley*, 10 Peters, 343.
Tyler vs. *Hand*, 7 How., 573.
United States vs. *Hodson*, 10 Wall., 395.
United States vs. *Mora*, 97 U. S., 413.
Jessup vs. *United States*, 106 U. S., 147.

There is probably no express authority conferred upon the United States to take a bond in the case at bar, and if a recovery is to be had it must be founded on the bond as a common law obligation. It is to be construed, therefore, as any other contract of a similar character would be. The bond recites that Howgate, a first lieutenant in the U. S. Army, had been assigned, with his consent, to duty as a property and disbursing officer Signal Service, U. S. Army, and it is an agreement that he will perform the duties of the office carefully while he holds it, and will, during the same time, faithfully expend all public money and honestly account for the same, and for all public property which shall come into his hands on account of the Signal Service of the U. S. Army.

The evidence shows that there had been such a disbursing officer for a number of years previous to Howgate's assignment. That the Signal Service branch of the U. S. Army had been established by law for a number of years is also clear. The parties to this contract, therefore, had in mind a definite service by Howgate. What the duties of the so-called office were is not material. If the office was established by law its duties are defined by the law. If not, it might be difficult to construe or define all the duties which the obligors agreed Howgate should faithfully perform, and therefore difficult to enforce performance of all. But one thing is clear, and that is what the obligors agreed Howgate should do with all public money which should come into his hands on account of the Signal Service, U. S. Army. They bound themselves that he should faithfully expend it and honestly account for it.

This obligation lacks nothing in definiteness sufficient for enforcement.

Counsel for Rogers, the plaintiff in error, have admitted and the court has found that during the time he occupied the so-called office of property and disbursing officer, and after the bond was given, he did receive public money on account of the Signal Service to the amount of much more than the penalty of the bond, and that he did not faithfully expend it or honestly account for it. It may be inferred from the bond and the designation of the office that a part of the duty of property and disbursing officer was to expend and honestly account for money coming into his hands on account of the Signal Service; but whether it was or not, it was part of the agreement in the bond, and no reason exists why it may not be enforced.

It is said that such an agreement can not be enforced, because there was no authority of law by which payments could be made to Howgate on account of the Signal Service, and it was against the policy of the law that he should be given disbursing duty. It is not, of course, claimed that money was not appropriated by Congress for the Signal Service, because that would be refuted by every annual appropriation bill for the Army and sundry civil expenses during the time Howgate acted as property and disbursing officer. It must be admitted that the law required the expenditure and disbursement of funds for the Signal Service.

The contention is that because an agent was selected for this work who was not properly appointed or qualified under the law to do it, no right exists in the Government

to enforce a contract against persons who, charged with full notice of this disqualification if any existed, agreed that this agent should faithfully expend and honestly account for all public money coming into his hands while acting as such agent. What illegality taints this contract that the obligors can take advantage of? Is it against public policy that money coming from the public treasury should be distributed to those objects which Congress intended? How then can a contract under such a distribution be against public policy or illegal? Does it lie in the mouth of the persons who knowingly induce the employment of an improper disbursing agent by guaranteeing a lawful distribution of funds through him, to deny their liability for his embezzlements because he ought not to have been employed?

All restrictions upon the selection of disbursing agents for the Government are presumably for the benefit and protection of the Government, and are certainly not for the benefit and protection of one who by promising to secure the Government from loss induced a violation of them. A surety under such circumstances is estopped to urge that his principal was not a duly qualified disbursing agent, and lawfully in receipt of those moneys which the words of the contract showed the parties intended and expected he would receive as such agent. In the case of *Miltonberger* vs. *Cooke* (18 Wall., 421), a collector of internal revenue received in payment of taxes bills of exchange. The law required that he should take only money. The acceptors of the bills sought to escape payment on the ground that he violated the law in taking the bills which made them illegal contracts, but this court held that the

law relied on was for the benefit and protection of the Government and could not be used by the tax payer to evade his liability. (See also *Boreland* vs. *Washington Co.* (20 Pa. St., 150.)

The United States vs. *Maurice* (2 Brockenborough, 96) was a case on all fours with the one at bar. It was a suit on the bond of Maurice, who was acting as agent of fortifications under color of an appointment by the Secretary of War. No law authorized a bond to be taken, and the Secretary of War had no power under the law or Constitution to appoint him. It was, nevertheless, held by Chief Justice Marshall that the sureties on his bond could not be heard to make the defense to an action for public money embezzled by their principal, that he was not legally appointed. Said Chief Justice Marshall (p. 113):

> I consider the appointment of James Maurice to the office of agent of fortifications by the Secretary of War as invalid; but the question, is the bond void on that account, still remains to be answered. It was undoubtedly intended as an office bond, and was given in the confidence that James Maurice was legally appointed to office. If the suit was instituted to punish him for neglect of duty, in the nature of nonuser, or for any other failure which could be attributed in any degree to the illegality of his appointment, I should be much disposed to think the plea a bar to the action. But this suit is brought to recover the money of the United States which came to the hands of James Maurice in virtue of his supposed office, and which he has neither applied to the purpose for which he received it, nor returned to the Treasury. In such a case, neither James Maurice, nor those who undertook for him, can claim anything more than positive law affords them.

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If the bond contained no reference to the appointment of James Maurice, as agent of fortifications; if its condition stated only that certain sums of money had been delivered to him to be disbursed under the discretion of the principal engineer, in the purchase of materials for fortifications and in the payment of laborers, its obligation, I presume, would not be questioned. It would be a contract which the United States might lawfully make.

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The plea does not allege that the thing to be done was unlawful, nor does it allege that the illegality of the appointment to office constituted any impediment to the performance of the condition of the bond. *Were it even improper to disburse the money received in the manner intended by the contract, it could not be improper to return it. There can be nothing unlawful in the engagement to return it. The obligation to return it, as in every other case of money advanced by mistake, is one which, independent of all express contract, would be created by the law itself. So far as respects the receiver himself, he would be bound by law to return the money not disbursed, and if he would be so bound, why may not others be bound with him for his doing that which law and justice oblige him to do?*

Admitting the appointment to be irregular, to be contrary to the law and its policy, what is to be the consequence of this irregularity? Does it absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? Does it authorize him to apply money so received to his own use? If the policy of the law condemns such appointments, does it also condemn the payment of moneys received under them?

Every word of the foregoing has application to the case at bar, and completely refutes the arguments made by counsel for plaintiff in error, that the bond here is void because the appointment or assignment of Howgate was invalid, illegal, and contrary to public policy. Authorities in the State courts sustaining the same view.

Williamson vs. *Wolff*, 37 Ala., 298.
Sprowl vs. *Lawrence*, 33 Ala., 674.
Jones vs. *Icauland*, 6 Humph., 195.
People vs. *Jenkins*, 17 Cal., 500.
Green vs. *Wardwell*, 17 Ill., 278.

In this last case the statute provided that no person should be eligible as constable unless he had lived six months in the district, and that any appointment in violation thereof should be null and void. In a suit on the bond of one who was ineligible under this statute as constable, but who acted as such, the bond was held a good common-law bond. Said the court, "Public policy, instead of prohibiting, requires the adoption of the principle that makes such bonds binding on all the obligors."

To the same effect are:

Harris vs. *Teal*, 14 B. Monroe, 29.
Horn vs. *Whittier*, 6 N. H. 88.
Iredell vs. *Barbee*, 9 Bredell, 250.
Reed vs. *Humphreys*, 7 Jones (N. C.) L., 258.
Boreland vs. *Washington*, 20 Pa. St., 150.
Cutter vs. *Dickinson*, 8 Pick., 386.
State vs. *Cooper*, 53 Miss., 615.
Boone Co. vs. *Jones*, 54 Iowa, 699.
Parish of St. Helena vs. *Burton*, 35 La. Ann., 521.
Town of Homer vs. *Merrett*, 27 La. Ann.
Weston vs. *Sprague*, 54 Vt., 395.

Lyndon vs. *Miller*, 36 Vt., 329.
Jones vs. *Gallatin Co.* 78 Ky., 491.
State vs. *Cameron*, 34 Iowa, 352.

We think we have shown a liability of the obligors on the bond in suit without regard to the legality of Howgate's assignment to the duties of the office. We merely wish to hold them to the letter of their contract, without using extraneous evidence to show the extent of their obligation. What is written on the bond is broad enough to cover the breach assigned in this case. It is wholly immaterial whether there ever was an office established by law known as a property and disbursing officer of the Signal Service, or whether Howgate was legally appointed to fill it. He did receive and disburse public money for the Signal Service, and his bondsmen agreed he should expend it faithfully and account for it honestly. He has not done so. He is liable in law for its repayment, and so are his bondsmen, who agreed he should repay it.

This is not the case of bondsmen for a public officer who agree that he shall faithfully account for all moneys lawfully coming into his hands, and who are sued for moneys received by the officer without authority of law. In such a case the bondsmen may avoid liability on the letter of their contract, which only makes them liable for money lawfully received by their principal.

Nor is this the case of a bond given to secure generally the faithful performance of the duties of an office which has no legal existence, like *Tinsley* vs. *Kirby* (17 South Carolina, 1). There because there was, in law, no office, there were no duties to perform, and the agreement was nuga-